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# State Judicial Elections and the Voting Rights Act: Defining the Proper Remedial Scheme

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# Note

## State Judicial Elections and the Voting Rights Act: Defining the Proper Remedial Scheme

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Less than two percent of Texas's elected state judges are black.[1] Less than three percent of Louisiana's elected state judges are black.[2] In other states where judges are elected, the level of minority representation on the bench is similar.[3] This underrepresentation of minorities on the bench is partly due to

1. Barbara L. Graham, *Judicial Recruitment and Racial Diversity on State Courts*, 74 JUDICATURE 29, 30 (1990). Texas has a black population of 11.9%. UNITED STATES DEP'T OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 26 (1989).

2. Graham, *supra* note 1, at 30. Louisiana has a black population of 30.6%. UNITED STATES DEP'T OF COMMERCE, BUREAU OF CENSUS, *supra* note 1, at 26.

3. Graham, *supra* note 1, at 30-32. Elections are the most common method of selecting and retaining state judges. PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY xi (1980). There are two general types of judicial elections: competitive elections and noncompetitive retention elections. *See* LARRY BERKSON ET AL., JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 6-7 (1980) [hereinafter JUDICIAL SELECTION]. In retention elections, voters simply vote for or against a sitting judge. SUSAN B. CARBON & LARRY C. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES v (1980). Retention elections have nothing to do with the initial selection of a judge; they only determine whether sitting judges will remain in office. *Id.* Competitive elections, on the other hand, are much like traditional nonjudicial elections and are either partisan or nonpartisan. JUDICIAL SELECTION, *supra*, at 6-7.

The table below lists the number of states that have judicial elections and the levels of the judiciary at which elections are used:

discrimination in the electoral process.[4] In particular, certain types of electoral laws and structures, when combined with the tendency of whites to vote against minority candidates, prevent the election of minority candidates.[5]

The Voting Rights Act of 1965[6] and the Voting Rights Act Amendments of 1982[7] prohibit electoral laws and structures that discriminate against minority voting strength.[8] Minority voters have recently used Section 2 of the Act to challenge judicial elections in several states.[9] In addition, the Justice Department has contested potentially discriminatory changes in state judicial election schemes under Section 5 of the Act.[10]

| *Type of Court* | *Type of Election* | | |
|---|---|---|---|
| | *Open Seat* | *Contested Occupied Seat* | *Uncontested Occupied Seat* |
| *Supreme* | 25 | 22 | 16 |
| *Intermediate Appellate* | 17 | 15 | 13 |
| *Trial*: | | | |
| General Jurisdiction | 31 | 26 | 10 |
| Limited Jurisdiction | 25 | 27 | 5 |
| Special Jurisdiction | 23 | 22 | 3 |

*See id.* at 18-45.

4. *See* JUDICIAL SELECTION, *supra* note 3, at 32-33.

5. *See infra* part I.B.

6. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

7. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)). Hereinafter, the Voting Rights Act of 1965 and the Voting Rights Act Amendments of 1982 will be referred to collectively as "the Voting Rights Act" or "the Act."

8. *See infra* part I.A.

9. *See* League of United Latin American Citizens v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S. Ct. 2376 (1991); Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988); Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988); Clark v. Roemer, 750 F. Supp. 200 (M.D. La. 1990), *vacated and remanded*, 111 S. Ct. 2881; Brooks v. State Bd. of Elections, No. CV288-146, 1989 U.S. Dist. LEXIS 4776 (S.D. Ga. 1989), *aff'd*, 111 S. Ct. 288 (1990); Southern Christian Leadership Conference of Alabama v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989); Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988); Williams v. State Bd. of Elections, 696 F. Supp. 1563 (N.D. Ill. 1986).

10. *See* Rorie Sherman, *Battle Lines Drawn in Georgia Bench Dispute*, NAT'L L.J., May 14, 1990, at 9 (describing efforts of Justice Department in Georgia voting rights litigation). *But cf.* Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 395-414 (1989) (arguing that the Reagan administration's weak enforcement of voting rights resulted in electorate polarization).

The federal circuits were split on whether Section 2 of the Act applies to judicial elections as well as to legislative and executive elections.[11] The United States Supreme Court resolved the issue in 1991, ruling in two cases that Section 2 of the Act does apply to judicial elections.[12] The Court did not, however, discuss how to remedy violations of the Voting Rights Act in judicial elections.

In devising remedies for violations, lower courts have treated judicial elections as they treat other elections.[13] However, judicial elections differ in significant ways from elections in the legislative and executive branches.[14] This Note argues that courts and legislatures should heed these differences when devising remedies for violations of the Voting Rights Act in judicial elections. Part I reviews Sections 2 and 5 of the Voting Rights Act and details some common types of electoral discrimination. Part II reviews past remedial efforts in judicial Voting Rights Act cases. Part III criticizes these efforts for failing to consider important differences between legislators and judges. Part IV proposes an approach to judicial remedies that takes these differences into account. This Note argues that one popular remedy, subdistricting, is inappropriate for the at-large election of lower court judges.

## I. ELECTORAL DISCRIMINATION AND THE VOTING RIGHTS ACT

Electoral discrimination against minority voters takes a

11. *Compare* League of United Latin American Citizens v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc) (holding that § 2 does not apply to judicial elections), *rev'd sub nom.* Houston Lawyer's Ass'n v. Attorney Gen. of Texas, 111 S. Ct. 2376 (1991), *with* Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) (holding that § 2 does apply).

12. In one case, the Court held that the term "representatives" in subsection 2(b) does not exclude judicial elections from § 2 coverage. Chisom v. Roemer, 111 S. Ct. 2354, 2368 (1991). In the other it held that trial court judges are not exempt from § 2 despite the state's argument that judges are within a statutory exemption for "single-member offices." Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S. Ct. 2376, 2381 (1991). The Court has also ruled that § 5 applies to judicial elections. Haith v. Martin, 618 F. Supp. 410, 412-13 (E.D.N.C. 1985), *aff'd mem.*, 106 S. Ct. 3268 (1986).

13. *See infra* note 110, and text accompanying notes 110-11.

14. Interestingly, where courts have recognized the differences between legislators and judges, they have done so only to exclude judicial elections altogether from certain types of Voting Rights Act scrutiny, and they have been overturned on appeal each time. *See United Latin American Citizens*, 914 F.2d at 625-28 (holding that judges are not "representatives" within the meaning of § 2's "effects" test).

number of forms. This Note focuses on the most common types of electoral discrimination that are actionable under Sections 2 and 5 of the Voting Rights Act. The Note focuses in particular on electoral discrimination resulting from the interaction of white bloc voting and at-large districting.

## A. THE VOTING RIGHTS ACT

Sections 2 and 5 of the Voting Rights Act are the most important provisions in the statutory and constitutional framework that protects the voting rights of minority voters.[15] Section 2 prohibits jurisdictions from maintaining *existing* electoral laws that "dilute" minority voting strength,[16] while Section 5 prohibits dilutive or discriminatory *changes* in a jurisdiction's electoral laws.[17]

15. The sponsors of the Voting Rights Act of 1965 intended it to enforce the Fifteenth Amendment. *See* Chisom v. Roemer, 111 S. Ct. 2354, 2357-58 (1991); *see also* Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982, in* MINORITY VOTE DILUTION 145, 149 (Chandler Davidson ed., 1984) (explaining that the Voting Rights Act was passed "against a background of ninety years of failure to enforce the Fifteenth Amendment"). Section 2 of the original Act incorporated the language of the Fifteenth Amendment and provided protection coextensive with that amendment. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (1988)); *see infra* notes 20-21 for text of amended § 2. Section 4 suspended the use of literacy tests and other discriminatory tests and devices in jurisdictions covered by the Act. Pub. L. No. 89-110, 79 Stat. 438 (1965) (codified as amended at 42 U.S.C. § 1973b (1988)). Section 5 required preclearance of changes in the electoral systems of certain covered jurisdictions. *Id.*; *see infra* notes 23-29 and accompanying text (discussing § 5).

In addition, the Fourteenth and Fifteenth Amendments also prohibit intentional electoral discrimination. Louisiana v. United States, 380 U.S. 145, 151 (1965). The one-person, one-vote rule, derived from the equal protection clause of the Fourteenth Amendment, requires that electoral districts be substantially equal in population. Reynolds v. Sims, 377 U.S. 533, 567-68 (1964) (state legislative districts); Gray v. Sanders, 372 U.S. 368, 379-80 (1963) (state executive offices). *Reynolds* and *Gray*, which addressed vote dilution on the basis of geography, are regarded as the precursors of modern minority vote dilution law. *See United Latin American Citizens*, 914 F.2d at 627-28 (recognizing a "conceptual link between individual vote dilution and minority vote dilution"). It should be noted, however, that the one-person, one-vote rule does not apply to judicial election districts. Wells v. Edwards, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973). *See generally* Andrew S. Marovitz, Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 YALE L.J. 1193, 1198-1200 (1989) (discussing *Wells* and its progeny).

16. *See infra* notes 18-22 and accompanying text. In addition to vote dilution, § 2 "prohibits all forms of voting discrimination." Thornburg v. Gingles, 478 U.S. 30, 45 n.10 (1986) (citing S. REP. NO. 417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207).

17. *See infra* notes 23-29 and accompanying text.

Section 2[18] prohibits existing electoral laws that, when combined with racial bloc voting, tend to dilute minority votes.[19] Subsection 2(a) follows the language of the Fifteenth Amendment in prohibiting voting laws that result in the "abridgement of the right to vote on account of race or color."[20]

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18. 42 U.S.C. § 1973 (1988).

19. *Thornburg*, 478 U.S. at 45-46.

20. Subsection 2(a) provides that:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. § 1973(a) (1988) (emphasis added).

Section 2 was enacted in 1965 without the "results" language. *See* Pub. L. No. 89-110, 79 Stat. 437 (1965). Thus, the original § 2 did not reach existing electoral systems that diluted minority voting strength unless they were adopted with discriminatory intent. The Supreme Court corrected this problem by reading the Fifteenth Amendment and the Equal Protection clause of the Fourteenth Amendment to prohibit minority vote dilution. White v. Regester, 412 U.S. 755, 765-67 (1973). To prove vote dilution under *White*, minority voters had to show that in the "totality of circumstances," *id.* at 769, they had less opportunity than others to participate in the political processes and elect legislators of their choice. *Id.* at 766 ("[P]laintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." (citing Whitcomb v. Chavis, 403 U.S. 124, 144-50 (1971))).

The Fifth Circuit provided a more detailed interpretation of the Supreme Court's *White* standard in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam). Proving minority vote dilution under *Zimmer* and *White* required evidence only that the challenged electoral system had a discriminatory *effect* on minority voting strength. *See* Philip P. Frickey, *Majority Rule, Minority Rights, and the Right to Vote: Reflections Upon a Reading of* MINORITY VOTE DILUTION, 3 LAW & INEQ. J. 209, 213 (1985). The *Zimmer* court identified several factors, distilled from Supreme Court decisions, that tend to prove minority vote dilution, including: 1) elected officials' lack of responsiveness to minority interests; 2) tenuous state policy supporting the electoral system; 3) a history of official discrimination; 4) large districts, majority vote requirements, or anti-single shot voting provisions; and 5) depressed socioeconomic status of minorities. *Zimmer*, 485 F.2d at 1305 (citing White v. Regester, 412 U.S. 755 (1973); Taylor v. McKeithen, 407 U.S. 191, 194 (1971); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971)). Ultimately, these factors and the *White* standard were incorporated into the legislative history of the 1982 Amendments to the Voting Rights Act. *See infra* note 22 and accompanying text.

The "effects" test established in *White* and *Zimmer* did not last long. Seven years later, a plurality of the Supreme Court held that *White* requires proof of discriminatory intent. Mobile v. Bolden, 446 U.S. 55, 65-74 (1980). The *Mobile* decision led Congress to amend the Voting Rights Act in 1982. *Thorn-*

Subsection 2(b) defines a violation of subsection 2(a) to include circumstances in which "members [of a minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[21]

How a group proves that it has "less opportunity" to elect candidates of its choice is not clear from the text of Section 2. However, Congress listed seven factors in the legislative history of the Voting Rights Act Amendments of 1982 that, when viewed in the "totality of the circumstances," tend to prove a claim of minority vote dilution.[22]

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*burg*, 478 U.S. at 35. In language that generally follows the *White* opinion, Congress reinstated the pre-*Mobile* effects test. *See id.* (stating that Congress revised § 2 to make clear that the *White* results test is relevant legal standard); Derfner, *supra* note 15, at 147 ("In amending § 2, Congress was acting to restore the test of *White v. Regester* as it had been understood until *Mobile*.").

21. Subsection 2(b) provides that:

> A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b) (1988).

The phrase "opportunity to participate and elect" was adopted from White v. Regester, 412 U.S. 755 (1973). *See supra* note 20. There are two important differences between *White* and amended subsection 2(b); Congress changed the phrase "opportunity to elect legislators" to "opportunity to elect representatives" and added a proviso at the end of subsection 2(b) to ensure that the phrase "opportunity to elect" did not create any right of proportional representation. Derfner, *supra* note 15, at 153 & 155.

22. These factors include: history of official discrimination; extent of racial polarization; size of the political subdivision; extent of minority access to the candidate slating process, if one is used; extent to which educational and employment discrimination hinders political participation by minorities; whether political campaigns involve racial appeals; and the number of elected minority officials. S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-207. These factors were originally identified by the Supreme Court in White v. Regester, 412 U.S. 755 (1973) and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). *See supra* note 20.

The Senate report also noted that two additional factors, a lack of responsiveness by elected officials to minority group needs and a tenuous policy underlying the use of a challenged voting procedure, may have probative value in some cases. S. REP. NO. 417 at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207. Both the Senate and the House reports emphasized that a finding of minority vote

Section 5[23] requires "covered" jurisdictions[24] to inform the Attorney General or the United States District Court for the District of Columbia of changes they plan in their electoral system.[25] If the court or the Attorney General finds that the changes have a discriminatory purpose or effect, they may prevent the implementation of the plans.[26]

Whether a change has a discriminatory purpose or effect is determined according to a two-part standard.[27] The Attorney General or the court should approve a change if it enhances or does not change the current level of minority electoral strength,[28] and is free of discriminatory intent under the Constitution.[29]

### B. ELECTORAL DISCRIMINATION AND MINORITY VOTE DILUTION

The term "electoral discrimination" refers to a wide variety of practices that are intended to or have the effect of discriminating against minority voters.[30] The most significant

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dilution does not require evidence of each factor. *Id.*; H.R. REP. NO. 227, 97th Cong., 2d Sess. 30-31 (1982).

23. 42 U.S.C. § 1973c (1988).

24. Covered jurisdictions are those districts that 1) maintained any test or device on November 1, 1964, November 1, 1968, or November 1, 1972, or 2) had less than 50% of voting age residents either vote or register to vote in the 1964, 1968, or 1972 presidential elections. 42 U.S.C. § 1973b (1988). Jurisdictions were covered for five years; the original five-year period was renewed in 1970 and in 1975, and, in 1982, it was renewed for 25 years. *Id.*; Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (1970); Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (1975); Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 131 (1982); *see* 28 C.F.R. § 51 Appendix (1990) (listing covered jurisdictions).

25. In practice, almost all covered jurisdictions seek preclearance from the Attorney General rather than from the district court. *See* Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 191 (1983) (describing "expense and delay" in obtaining district court preclearance).

26. 28 C.F.R. §§ 51.1, 51.10 (1990). The burden is on the covered jurisdiction to prove the nondiscriminatory nature of any changes. *See* Motomura, *supra* note 25, at 245.

27. Beer v. United States, 425 U.S. 130, 141 (1976).

28. This is known as the retrogression test. *See id.* at 140-42; 28 C.F.R. § 51.54 (1990).

29. Motomura, *supra* note 25, at 245. In reality, as Motomura has shown, preclearance determinations involve a much broader range of considerations than the *Beer* test suggests and borrow heavily from minority vote dilution standards developed under § 2. *Id.* at 193, 206-10.

30. Chandler Davidson, *Introduction* to MINORITY VOTE DILUTION 1, 3 (Chandler Davidson ed., 1984).

form of electoral discrimination, minority vote dilution,[31] involves the reduction of a linguistic, ethnic, or racial minority group's political power.[32] Essential to the concept of minority vote dilution is the interaction between white bloc voting against minority candidates[33] and electoral mechanisms that have a potentially vote dilutive effect.[34]

"White bloc voting" occurs when a white majority systematically votes against minority candidates.[35] When faced with a choice between a black candidate and a white candidate, white voters often vote as a cohesive bloc for the white candidate

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31. Minority vote dilution is one of three traditionally recognized forms of electoral discrimination. *Id.* The other two traditionally recognized forms of electoral discrimination are disfranchisement and candidate diminution. *Id.* Disfranchisement includes practices such as voter registration purges, difficult registration procedures, and open threats that prevent people from voting. *Id.* Candidate diminution occurs when minority candidates are prevented from running for office. *Id.* Methods used to discourage minority candidates include setting high filing fees, changing elective posts to appointive ones, and threatening potential minority candidates. *Id.*

Both disfranchisement and candidate diminution can result indirectly from minority vote dilution. *Id.* at 3-4. For example, if a dilutive electoral system makes it impossible for minority candidates to win elective office, fewer minority voters will go to the polls and fewer minority candidates will run for office. *Id.*

A fourth type of electoral discrimination, specific to single-member offices, involves the "impermissible 'concentration of power' " in a single elected official. Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 MICH. L. REV. 2199, 2205 (1990). This type of electoral discrimination has been recognized, at least implicitly, by the 11th Circuit; in *Dillard v. Crenshaw County*, the court held that the at-large election of a county commission consisting of two associate commissioners and a chair violated § 2. 831 F.2d 246, 248 (11th Cir. 1987). The defendants proposed a commission composed of five associate commissioners elected from single-member districts and one chair elected at-large. *Id.* at 292-93. The district court rejected this proposal because " 'the [associate commissioners] elected by a racially fair district election method would have their voting strength and influence diluted.' " *Id.*; *see* Sebold, *supra*, at 2208-10 (discussing *Dillard*).

32. *See* Davidson, *supra* note 30, at 4. In this Note, the term "minority" includes any linguistic, ethnic, or racial minority.

33. *See* Thornburg v. Gingles, 478 U.S. 30, 56 (1986); Rogers v. Lodge, 458 U.S. 613, 623 (1982); United States v. Marengo County Comm'n, 731 F.2d 1546, 1566-67 (11th Cir. 1984); *see also* Davidson, *supra* note 30, at 4 (Minority vote dilution occurs when "the voting strength of an ethnic or racial minority group is diminished or canceled out by the *bloc vote* of the majority." (emphasis added)).

34. *See Thornburg*, 478 U.S. at 87 (O'Connor, J., concurring) (defining minority vote dilution as an "impermissible discriminatory effect that a multimember or other districting plan has when it operates 'to cancel out or minimize the voting strength of racial groups' " (quoting White v. Regester, 412 U.S. 755, 765 (1973))).

35. *See id.* at 53 n.21 (defining "racial bloc" voting).

without regard to non-racial factors such as party affiliation or policy preferences.[36]

Practices that dilute minority voting strength tend to be subtle and often do not appear discriminatory on their face.[37] Although the following mechanisms are not vote dilutive *per se*, when combined with white bloc voting they can dilute minority voting strength.

At-large, or multi-member, districting[38] is the most common vote dilutive mechanism.[39] In an at-large electoral scheme, all of the representatives of a relatively large district such as a city or county are chosen by all the voters in that district. Such a scheme dilutes minority votes by "submerging them in a white majority" when minority voters constitute a majority in some neighborhoods but not in the entire district.[40]

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36. *See id.* at 69; HAROLD W. STANLEY, VOTER MOBILIZATION AND THE POLITICS OF RACE 41-42 (1987); *see also* Davidson, *supra* note 30, at 14 (stating that white bloc voting is especially "intense" in the South and Southwest). On the problems inherent in determining whether white bloc or racially polarized voting exists, see generally Evelyn E. Shockley, Note, *Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice*, 89 MICH. L. REV. 1038 (1991).

Some political scientists have suggested that racial polarization may be more pronounced in "low salience" elections, such as judicial elections, where voters know less about the candidates. *See* Richard L. Engstrom, *When Blacks Run for Judge: Racial Divisions in the Candidate Preferences of Louisiana Voters*, 73 JUDICATURE 87, 87-88 (1989). For example, in 52 Louisiana judicial elections where voters had a choice between black and white candidates, black candidates never received a majority of the white vote. *Id.* at 88-89. Black candidates received more than 25% of the white vote in only six of the 52 elections. *Id.*

37. *See* Davidson, *supra* note 30, at 4.

38. This Note uses the terms "at-large" and "multi-member" districting interchangeably. Technically, however, at-large and multi-member districts are not identical; if an at-large district elects only one representative, it is not a multi-member district.

39. The Supreme Court repeatedly has recognized that at-large districting may dilute minority voting strength. *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986); Rogers v. Lodge, 458 U.S. 613, 617 (1982); White v. Regester, 412 U.S. 755, 765 (1973); Whitcomb v. Chavis, 403 U.S. 124, 143-44 (1971). The Court has been careful to note, however, that at-large elections are not per se violative of § 2. *See Thornburg*, 478 U.S. at 46; *Rogers*, 458 U.S. at 617; Fortson v. Dorsey, 379 U.S. 433, 436-39 (1965). *But cf.* Barbara L. Berry & Thomas R. Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85, 122 (1975) ("At-large elections are inherently discriminatory.").

40. *Thornburg*, 478 U.S. at 46 ("[T]he legislative decision to employ [at-large districts], rather than single-member, districts . . . dilutes [minority] votes by submerging them in a white majority."); *id.* at 46 n.11 ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters." (citation omitted)).

If majority white voters in such a district cast their ballots as a bloc against minority candidates, it is impossible for minority candidates to be elected.[41]

The Supreme Court has interpreted Section 2 to require that three threshold factors exist before a plaintiff can prove that an at-large districting scheme is vote dilutive.[42] First, a minority group must be "sufficiently large and geographically compact" to constitute a majority in a single-member district.[43] Second, the minority group must be "politically cohesive."[44] Finally, the majority must vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[45]

A number of mechanisms used in conjunction with at-large voting enhance its dilutive effect. One such mechanism is "anti-single-shot" voting.[46] "Single-shot" voting allows minority voters to elect candidates they prefer in spite of at-large districting.[47] For example, in a hypothetical at-large election in which nine white candidates and one minority candidate are vying for three positions, each voter has three votes, and the three candidates who receive the most votes are elected. Minority group members in this district can increase their voting strength by using only one of their votes and casting it for the minority candidate. In a jurisdiction with an anti-single-shot rule, however, they would be required to use all of their votes.[48]

Two other mechanisms, designated seat rules[49] and stag-

41. *Id.* at 48 ("[W]here minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." (footnote omitted)).

42. *Id.* at 50-51. However, the standard for assessing a vote dilution claim that does not arise from at-large districting is not certain. *See* Gregory G. Ballard, Note, *Application of Section 2 of the Voting Rights Act to Runoff Primary Election Laws*, 91 COLUM. L. REV. 1127, 1140-46 (1991); Sebold, *supra* note 31, at 2217-18.

43. *Thornburg*, 478 U.S. at 50.

44. *Id.* at 51.

45. *Id. See generally* Sushma Soni, Note, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651 (1990) (discussing *Thornburg* criteria).

46. Davidson, *supra* note 30, at 6-7.

47. City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980) (" 'Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.' " (quoting U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 206-07 (1975))).

48. Davidson, *supra* note 30, at 6-7.

49. Designated seat, or numbered post, rules require candidates to declare for a numbered post on the ballot in at-large voting. *Id.* at 7. Voters cast one

gered terms,[50] are akin to anti-single-shot rules and have similar dilutive effects when used with at-large districting.[51] Both variations are fairly common, especially in the South.[52]

Several other dilutive mechanisms can be combined with at-large elections or used alone. One of the most common is the majority runoff or runoff primary.[53] Majority runoff elections require that winning candidates receive a majority rather than a plurality of votes cast.[54] If no candidate receives a majority, the two top finishers compete in a runoff election.[55] Although minority candidates can often win a plurality when running against two or more white candidates, majority runoff requirements allow a cohesive white voting bloc to control the outcome of the election.[56]

Vote dilution also can be accomplished by reducing a governmental body's size,[57] using slating groups to control the

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vote per post. *Id.*; *see also City of Rome*, 446 U.S. at 185 n.21 (recognizing that numbered posts prevent blacks from electing candidates by single-shot voting (citing Rome v. United States, 472 F. Supp. 221, 244 n.95 (D.D.C. 1979))).

50. In a district with staggered terms, voters elect only a portion of the body each term. Davidson, *supra* note 30, at 7.

51. *Id.*

52. *Id.* at 10-15.

53. *Id.* at 6. For a historical and political discussion of runoff primaries, see generally William Simpson, Note, *The Primary Runoff: Racism's Reprieve?*, 65 N.C. L. REV. 359 (1987). Majority vote requirements have been the subject of a great deal of litigation over the past few years; courts disagree over whether majority vote requirements in single-member districts can violate § 2. *See* Whitfield v. Democratic Party, 890 F.2d 1423, 1432 (8th Cir. 1989) (finding that Arkansas statute requiring primary election runoff results in minority vote dilution), *aff'd per curiam*, 902 F.2d 15 (8th Cir. 1990), *cert. denied sub nom.* Whitfield v. Clinton, 111 S. Ct. 1089 (1991); Butts v. City of New York, 779 F.2d 141, 148-49 (2d Cir. 1985) (finding that New York runoff primary law does not violate § 2), *cert. denied*, 478 U.S. 1021 (1986); *see also* Ballard, *supra* note 42, at 1147-50 (arguing that because runoff primary election laws fall within § 2 coverage, courts should invalidate runoff primaries where minority voters show that "under plurality rule they would have more opportunity than under an existing majority vote rule"); Matthew G. McGuire, Note, *Assessing the Legality of Runoff Elections Under the Voting Rights Act*, 86 COLUM. L. REV. 876, 885-87 (1986) (arguing that courts should invalidate runoff primaries where there is evidence of "significant racial discrimination").

54. Davidson, *supra* note 30, at 6; *see, e.g.*, MISS. CODE ANN. §§ 23-15-191, 23-15-1013 (1990) (requiring majority vote in judicial election primaries).

55. Davidson, *supra* note 30.

56. *Id.* at 6.

57. In a jurisdiction with a single-member districting scheme, decreasing the size of the governmental body reduces the number of subdistricts from which a minority group can elect candidates. In an at-large system, white voters may be less likely to vote for minority candidates who will be part of a

nomination process,[58] gerrymandering,[59] or changing from elective to appointive methods of candidate selection.[60]

## C. REMEDIES

### 1. Remedial Power and Process

Section 2 gives district courts broad remedial power. To remedy a Section 2 violation, a court must "exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."[61]

The principal limit on the court's authority is the requirement that defendant jurisdictions have the first opportunity to

small governmental body. *Id.* at 7 (citing Delbert Taebel, *Minority Representation on City Councils*, 59 SOC. SCI. Q. 151 (1978)).

58. Slating groups are partisan or non-partisan groups that control the nomination process in a jurisdiction and can ensure that minority candidates are not nominated, or that minority candidates represent majority interests. Davidson, *supra* note 30, at 7-8. *See generally* Chandler Davidson & Luis R. Fraga, *Nonpartisan Slating Groups in an At-Large Setting*, *in* MINORITY VOTE DILUTION 119 (Chandler Davidson ed., 1984) (presenting case studies of four Texas cities with at-large election systems and nonpartisan slating groups showing that minority community had little involvement in nomination process).

59. By annexing white areas and de-annexing minority areas, jurisdictions can redraw boundaries to exclude minority voters. Davidson, *supra* note 30, at 8-9; *see* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (city council redrew city boundaries to exclude almost all minority voters). More commonly, district boundaries are drawn to dilute minority voting strength during reapportionment. *See generally* Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, *in* MINORITY VOTE DILUTION 85 (Chandler Davidson ed., 1984) (stating that gerrymandering techniques include "cracking," in which concentrations of minority voters are dispersed among separate districts, and "packing," in which minority voters are overly concentrated in a single district).

60. *See* Robert McDuff, *The Voting Rights Act and Judicial Elections Litigation: The Plaintiffs' Perspective*, 73 JUDICATURE 82, 83 (1989) (noting attempt by Mississippi legislature to change the method of selecting school superintendents from election to appointment had the purpose and effect of diluting minority voting strength (citing § 5 objection letter to the Mississippi attorney general from the U.S. Department of Justice)).

61. S. REP. NO. 417, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208 (footnote omitted); *see also* Dillard v. Crenshaw County, 831 F.2d 246, 252 (11th Cir. 1987) (holding that courts cannot approve a remedy "that will not with certitude *completely* remedy the Section 2 violation"); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 219 (A "court's remedial powers may extend beyond simply eliminating the actual mechanism of discrimination when a broader remedy is necessary to remedy the 'condition' that offends the principles of racial justice.").

develop a remedy, subject to court approval.[62] Courts also must consider that devising a remedy for a Section 2 violation is an "intensely local approach."[63]

Although a court's powers are broad, Section 2 remedies are not the sole province of the courts. Because courts often defer their remedial power to a legislature, legislatures also participate in devising Section 2 remedies.[64]

Under Section 5 of the Voting Rights Act, the state is responsible for devising a suitable nondiscriminatory electoral system.[65] Because it can block any discriminatory electoral change, however, the Justice Department has substantial leverage to ensure that a jurisdiction adopts an acceptable electoral plan.[66] If the state fails to submit a change for preclearance, plaintiffs can seek injunctive relief in federal district court.[67]

### 2. Remedies for At-Large Districting Violations of the Voting Rights Act

Several remedies can be used to cure violations of Sections 2 and 5 resulting from at-large districting.[68] One possibility is subdistricting or creating single-member districts. Subdistricting is the splitting of at-large electoral districts into smaller subdistricts.[69] Typically, an at-large electoral district is divided into several single-member subdistricts.[70] Some of the subdistricts are "safe" districts, drawn to ensure that the population of racial or ethnic minority groups is large enough to permit minority voters in these districts to elect their preferred

62. Upham v. Seamon, 456 U.S. 37, 40-43 (1982). Some courts have construed this to mean that the state legislature must have the opportunity to devise a remedy. *E.g.*, Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988). Other courts, however, have merely given the state the first opportunity to submit a plan in the remedial stage of legislation. *E.g.*, Mabus v. Martin, 700 F. Supp. 327 (S.D. Miss. 1988) (devising remedy without giving legislature an opportunity to develop remedy).

63. Thornburg v. Gingles, 478 U.S. 30, 78-79 (1986); Karlan, *supra* note 61, at 221.

64. *See, e.g.*, Chisom v. Roemer, 853 F.2d at 1192 (holding that legislature should have opportunity to develop remedy before court steps in).

65. *See supra* notes 23-29 and accompanying text.

66. *See supra* note 26 and accompanying text.

67. Haith v. Martin, 618 F. Supp. 410, 414 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986).

68. For the purposes of this Note, it makes little difference whether a legislature or a court implements the remedy.

69. Davidson, *supra* note 30, at 5.

70. *Id.*

candidates.[71]

A second set of remedies that can be used to cure at-large districting violations is a group of remedies called "alternative voting systems."[72] Two alternative voting systems in particular, limited voting and cumulative voting, may cure minority vote dilution.[73]

In a limited voting system, each voter has fewer votes than the number of at-large positions to be filled.[74] For instance, if an at-large district has twenty judgeships to be filled, voters in that district will be limited to less than twenty votes. Limiting the number of votes each voter may cast increases the ability of strategically-voting minority groups to gain representation.[75]

Limited voting has been used in several local government elections in the Northeast and, most notably, in elections for certain city council seats in the District of Columbia and in New York City.[76] A few courts have imposed limited voting to

71. *Id.*; *see also* Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 1004 (1981), *reprinted in* MINORITY VOTE DILUTION 65, 78 (Chandler Davidson ed., 1984) (stating that minority representation may increase after at-large districts are subdivided). Experts estimate that at least a 65% minority population is necessary to ensure the election of the minority group's preferred candidate. *See* Frickey, *supra* note 20, at 219-20 (citing Parker, *supra* note 59, at 111).

72. There is a large body of political science literature on alternative voting systems. *See, e.g.*, ENID LAKEMAN, HOW DEMOCRACIES VOTE: A STUDY OF ELECTORAL SYSTEMS (1974). Over the last decade, several legal commentators have discussed alternative voting systems in the context of the Voting Rights Act. *E.g.*, Karlan, *supra* note 61, at 219-36 (discussing limited voting and cumulative voting as modifications to at-large elections); Edward Still, *Alternatives to Single-Member Districts*, *in* MINORITY VOTE DILUTION 249 (Chandler Davidson ed., 1984) (discussing limited voting, cumulative voting, proportional representation, and add-on voting); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982) [hereinafter *Alternative Voting Systems*] (arguing that cumulative voting is a desirable remedy for discriminatory at-large voting systems).

73. *See* Still, *supra* note 72, at 253-58.

74. Karlan, *supra* note 61, at 223-24.

75. The following formula gives the percentage of the electorate whose support a particular candidate needs in order to win a seat:

$$\frac{\textit{number of votes each voter can cast}}{(\textit{number of votes each voter can cast}) + (\textit{number of seats to be filled})}$$

*Id.* at 224. For example, if 20 judgeships are to be filled and each voter has 15 votes, a candidate will need to receive votes from almost 43% of the electorate in order to be elected.

76. *Id.* at 224 & n.217.

remedy Section 2 violations.[77] Where it has been used, limited voting has successfully remedied minority vote dilution and increased the number of minority elected officials.[78]

In the second alternative voting system, cumulative voting, voters may aggregate their votes for one or more candidates.[79] For example, if twenty judgeships are to be filled, each voter has twenty votes and she or he may cast all twenty for one candidate.[80] Unlike limited voting, cumulative voting has been used only sparingly in elections for public office in the United States.[81] Recently, however, five Alabama jurisdictions adopted cumulative voting plans as part of the settlement of Section 2 litigation.[82]

A third approach to remedying at-large districting violations is simply to eliminate judicial elections. A few states faced with liability under the Voting Rights Act have considered eliminating judicial elections and replacing them with appointive or merit judicial selection methods.[83] Appointive methods of judicial selection include merit selection commission plans and direct appointment by the governor or legislature.[84]

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77. *Id.* at 227 (citing Alabama and North Carolina courts). The use of limited voting as a remedy in North Carolina was reversed on appeal. *Id.* at 228 n.231 (citing McGhee v. Granville County, No. 88-1553, slip op. (4th Cir. Oct. 21, 1988)).

78. *Id.* at 227-28. For example, in Alabama, black candidates in 13 of 14 jurisdictions were successful in primary elections. *Id.*

79. *Id.* at 231.

80. Thus, if 20 judgeships are to be filled, a particular candidate needs only the full support of 5% of the electorate in order to win a seat. *See id.* at 232.

81. *Id.* at 232-33. Cumulative voting is used frequently to elect corporate boards of directors. 2 HAROLD MARSH, JR., MARSH'S CALIFORNIA CORPORATION LAW § 11.2 (2d ed. 1981).

82. Karlan, *supra* note 61, at 234. The jurisdictions were three cities, a county commission, and a county school board. *Id.* After the change to cumulative voting, black candidates were elected in four of the five jurisdictions. *Id.* at 234-35.

83. *The Voting Rights Act and Judicial Elections: An Update on Current Litigation*, 73 JUDICATURE 74, 75-76 (1989) [hereinafter *Update*] (describing Texas's efforts to replace judicial elections with appointment).

84. JUDICIAL SELECTION, *supra* note 3, at 6. Under a commission plan, a nonpartisan commission selects a list of candidates who are qualified to fill judicial vacancies and the governor selects new judges from the list. *Id.* In most states with commission plans, judges must be periodically "reelected" in retention elections in which voters may vote for or against the sitting judge. *Id.* Aside from elections, commission plans are the most common judicial selection method. *Id.*

In a few states, the governor appoints judges without the help of a nomi-

## II. APPLICATION OF THE VOTING RIGHTS ACT TO AT-LARGE JUDICIAL ELECTIONS

Voters in several states have challenged the at-large election of judges.[85] This section of the Note examines the remedial approaches taken in Louisiana and Mississippi. Louisiana was chosen because of the far-ranging and controversial nature of the litigation in that state, while Mississippi was chosen because of the active role the district court took in fashioning a remedy.

Louisiana voters have challenged the state's judicial election system in two cases. The plaintiffs in *Chisom v. Edwards* challenged Louisiana's method of selecting Supreme Court justices.[86] Under the Louisiana system, voters elected five of the seven justices from single-member subdistricts and two at-large from a multi-member subdistrict.[87] The plaintiffs in *Clark v. Edwards* challenged the use of at-large, multi-member districts to elect family court, district court, and court of appeals judges.[88]

After finding Section 2 violations in both cases, the courts left the remedy to the Louisiana legislature.[89] The legislature divided the multi-member district into two single-member districts, one with a majority black population and the other with a majority white population.[90]

The dilution in *Clark* was more extensive and required a comprehensive remedy.[91] The governor appointed a task force

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nating committee. *Id.* Hawaii and Illinois allow judges to fill some vacancies on the bench. *Id.* And in a small number of states, the legislature elects judges. *Id. See generally* JUDICIAL SELECTION, *supra* note 3, at 10-179 (presenting state provisions relating to judicial selection in each state).

85. *See supra* note 9.

86. 659 F. Supp. 183, 183 (1987), *rev'd*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988).

87. LA. REV. STAT. ANN. § 13:101 (West 1983).

88. 725 F. Supp. 285, 287 (M.D. La. 1988), *vacated sub nom.* Clark v. Roemer, 750 F. Supp. 200 (M.D. La. 1990), *vacated and remanded*, 111 S. Ct. 2881 (1991).

89. *See* Judith Haydel, *Section 2 of the Voting Rights Act of 1965: A Challenge to State Judicial Elections Systems*, 73 JUDICATURE 68, 71 (1989). In *Clark*, the court enjoined all judicial elections until the legislature revised the system. *Id.*

90. 1989 La. Acts § 1, No. 837. The Legislature, however, made the implementation of the subdistricting remedy contingent upon the adoption by voters of an amendment to the Louisiana Constitution. *Id.* § 2. The subdistricting remedy failed to take effect when voters rejected the amendment. LA. REV. STAT. ANN. § 13:101, Historical and Statutory Notes (West Supp. 1991).

91. *See* Haydel, *supra* note 89, at 71.

to develop a remedial plan.[92] After a series of hearings, the task force devised three alternative plans: a merit selection plan, a subdistricting plan, and a plan combining merit selection at the appellate level with subdistricting at the district court level.[93] The legislature ultimately approved a plan that created single-member and multi-member subdistricts in the districts and circuits where Section 2 violations were found.[94]

Mississippi voters challenged that state's system of electing circuit, chancery, and county court judges in *Martin v. Mabus*.[95] Under the Mississippi system, voters elected judges from at-large, multi-member districts with numbered post requirements.[96]

After finding Section 2 violations in eight judicial districts,[97] the court asked the parties to submit remedial proposals.[98] The plaintiffs submitted a plan calling for single-member subdistricts that did not alter existing district boundaries.[99] The state did not present a formal plan, but objected to the plaintiffs' plan.[100]

After rejecting the plaintiffs' plan, the court appointed an expert to draft a remedial plan.[101] The court directed that the plan meet several requirements, the most important being that each district include at least one judicial subdistrict with a black majority population of sixty percent[102] and that single-member subdistricts be contiguous and as compact as possible.[103] After the expert completed the plan, the court allowed

92. *Id.*
93. *Id.* at 71-72.
94. *Id.* at 72.
95. 700 F. Supp. 327, 329 (S.D. Miss. 1988).
96. *Id.* at 329-30. Judicial elections in Mississippi are partisan and a majority vote is required in party primaries. MISS. CODE ANN. §§ 23-15-305, 23-15-1013 (Supp. 1987).
97. Martin v. Allain, 658 F. Supp. 1183, 1204 (S.D. Miss. 1987).
98. Martin v. Mabus, 700 F. Supp. at 330.
99. *Id.*
100. *Id.* During the same hearing, the court rejected a proposal by the state that existing districts be retained and that only the post requirement be eliminated. *Id.*
101. *Id.* at 330-31.
102. *Id.* at 333.
103. *Id.* at 334. The other requirements, in descending order of importance, were that: (1) in multi-county districts whole counties should be preserved where possible; (2) cities or towns should not be subdivided where possible; (3) where counties had to be subdivided, subdistricts should be drawn along current precinct lines; (4) precincts should not be divided among judicial subdistricts; (5) if a county or city were divided, common lines should be used for both circuit and chancery court subdistrict boundary lines; and (6) only a 15%

the parties to file objections and propose alternatives before it entered its final remedial order.[104]

The court's final plan divided the three circuit court districts into two, three, and four subdistricts respectively.[105] It also split the four chancery court districts into two to four subdistricts and the county court district into three subdistricts.[106]

Voters in other states, including Alabama, Georgia, Illinois, North Carolina, and Texas have also challenged judicial election systems under the Voting Rights Act,[107] but few courts have been as bold as the *Martin* court in developing and implementing remedies.[108] In most of the other states where violations have been found, the courts have delegated their authority to create remedies to the legislature, but the legislatures have been unwilling to devise acceptable remedies.[109]

These cases suggest two general characteristics of the remedial process in voting rights litigation involving judicial elections. First, when devising remedies, courts and legislatures treat judicial elections as they do legislative elections,[110] choosing subdistricting or single-member districting as the primary remedy for minority vote dilution.[111] Second, judicial election litigation is characterized by judicial deference to legislative judgment.[112] *Martin* aside, when litigation reaches the remedial stage, courts generally leave the determination of remedies to state legislatures.[113]

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maximum range of deviation was allowable for a population variance among subdistricts within a judicial district. *Id.* at 334-35.

104. *Id.* at 331.

105. *Id.* at 345-48.

106. *Id.* at 345-47, 349.

107. *See supra* note 9.

108. *See generally Update*, *supra* note 83 (discussing a number of recent decisions).

109. *See id.*

110. This is not surprising, given that vote dilution law developed in the context of challenges to at-large and multi-member legislative bodies. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) (challenge to legislative redistricting scheme that included multimember districts); Rogers v. Lodge, 458 U.S. 613 (1982); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966). Here, "legislative elections" includes elections for all multi-member, collegial decision-making bodies, including city councils, county commissions, and state legislatures.

111. *See supra* notes 86-94 and accompanying text; *see also Alternative Voting Systems*, *supra* note 72, at 144 ("[T]he virtually exclusive judicial remedy for unlawfully discriminatory at-large voting systems is single-member districting." (footnotes omitted)).

112. *See supra* note 89 and accompanying text.

113. *See supra* note 89 and accompanying text.

After setting out some of the differences between legislatures and the courts, the remainder of this Note examines whether these differences should lead to a rethinking of current remedial practices, and in particular, whether subdistricting should be used as a remedy for at-large districting violations. Although it does not explicitly address the value of judicial deference to legislative judgment, implicit in the remedial scheme this Note proposes is a more active judicial role in devising and implementing vote dilution remedies.

## III. DISTINGUISHING BETWEEN LEGISLATIVE AND JUDICIAL ELECTIONS

The roles of judges and legislators differ in ways that are crucial to the choice of remedies for violations of the Voting Rights Act in judicial elections. In particular, the difference in how judges and legislators reach decisions makes subdistricting, a common remedy for legislative election violations, inappropriate for judicial election violations.

The traditional view of the differences between legislators and judges is that legislators, primarily guided by political concerns, make law, while judges, insulated from political pressure, interpret or "find" the law.[114] In other words, according to this view, one can distinguish between *what* judges and legislators do, and between *how* judges and legislators make decisions.[115]

The first distinction, between what legislators and judges do, is blurred. The Legal Realists persuasively argue that judges, like legislators, inevitably make law and set policy.[116] Thus, while one can argue that judges *ought* not make policy, they *in fact* do just that.[117]

The second distinction, however, between *how* legislators

114. *See* League of United Latin American Citizens v. Clements, 914 F.2d 620, 628 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers Ass'n v. Attorney Gen. of Texas, 111 S. Ct. 2376 (1991) ("Judges speak the voice of the law.").

115. This Note does not pretend to offer a rigorous jurisprudential analysis of the differences between judges and legislators, nor does it defend any particular theory of the respective roles of judges and legislators. Rather, this Note's distinctions between judges and legislators are based on generalizations about the average judge and legislator.

116. *E.g.*, ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE 187 (1989); Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13, 21-23 (David Kairys ed., 1990).

117. *See* DUBOIS, *supra* note 3, at 23 ("[J]udges not only make conscious policy choices in the adjudication of cases and in the exercise of the power of

and judges make decisions, is still valid. This distinction is due to two differences between judges and legislators that are relevant to the remedial question this Note addresses; first, judges and legislators "represent"[118] their constituents differently; and second, legislators act collegially while trial court judges decide cases individually.

First, legislators respond both to the demands of their constituencies at-large and to the demands of much smaller individual constituencies and interest groups.[119] Judges, on the other hand, "speak for and to the *entire* community."[120] Judges are not "responsive" to the demands of particular constituencies in the same sense as legislators,[121] but instead respond to community values and norms.[122] It is generally agreed that judges, unlike legislators, should not be partial to the wishes of a specific individual or subgroup.[123]

As the Fifth Circuit put it, legislators "synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues."[124] In contrast, judges represent constituents indirectly and are supposed to be insulated from

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judicial review, but also engage in political decision-making as a matter of function.").

118. On the "concept of representation," see Hanna Pitkin, *The Concept of Representation*, *in* REPRESENTATION 1, 6-23 (Hanna Pitkin ed., 1969) (surveying historical and philosophical definitions of representation).

119. *See* League of United Latin American Citizens v. Clements, 914 F.2d 620, 622 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers Ass'n v. Attorney Gen. of Texas, 111 S. Ct. 2376 (1991).

120. *Id.* at 628.

121. *See id.* at 629; Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988), *vacated sub nom.* Clark v. Roemer, 750 F. Supp. 200 (M.D. La. 1990), *vacated and remanded*, 111 S. Ct. 2881 (1991).

122. *See* Chisom v. Roemer, 111 S. Ct. 2354, 2366 n.27 (1991) ("A judge brings to his or her job of interpreting texts 'a well-considered judgment of what is best for the community.' " (quoting Gregory v. Ashcroft, 111 S. Ct. 2395, 2404 (1991))). This is especially true in areas such as sentencing, where judges exercise discretion. *See* James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making*, 14 LAW & SOC'Y REV. 343, 358-59 (1980) (noting direct correlation between the sentencing behavior of judges and community attitudes); *see also* ALEXANDER B. SMITH & HARRIET POLLACK, CRIMINAL JUSTICE: AN OVERVIEW 7-8 (3d ed. 1991) (stating that judges "must make decisions that avoid offending community mores or expectations"). Although legislators certainly respond to "community values and norms," they respond more directly and to more discrete constituencies than do judges.

123. *But cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a . . . more searching judicial inquiry.").

124. *United Latin American Citizens*, 914 F.2d at 625.

public demands.[125]

This explains why judicial candidates often are subject to stringent rules limiting the types of claims they may make in an election campaign.[126] Under the American Bar Association Model Code of Judicial Conduct, for example, judges may speak only about their experience or qualifications, not about specific policy issues.[127]

This distinction, arguably, ignores the reasons why states adopted judicial elections and the reality that voters' policy preferences affect judicial decision making. In part, states adopted elections to ensure that when judges make policy they are accountable to the public.[128] Voters can and do remove state judges from office if they disagree with their decisions or

125. For example, judges do not meet with lobbyists or constituents to discuss how to decide a case. *Cf.* Stokes v. Fortson, 234 F. Supp. 575, 577 (N.D. Ga. 1964) (per curiam) (stating that judges "are not representatives in the same sense as are legislators or the executive").

126. *See* DUBOIS, *supra* note 3, at 32.

127. The *Model Code of Judicial Conduct* forbids candidates for judicial office from: promising to do anything in office other than faithfully and impartially performing their duties; committing or appearing to commit themselves with respect to cases, controversies or issues likely to come before the court; or misrepresenting their or their opponents' identity, qualifications, present position or other relevant fact. MODEL CODE OF JUDICIAL CONDUCT, Canon 5(A)(3) (1990). *See* Thomas M. Ross, Note, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights*, 7 LAW & INEQ. J. 107 (1988) (explaining that a judge who pledges to be " 'tough on crime' " or says that she or he will have a " 'strict sentencing philosophy' " violates the Canon (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1444 (1980)). *But see* American Civil Liberties Union v. Florida Bar, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990) (preliminarily enjoining enforcement of rule identical to Model Judicial Canon 5(A)(3)(d) in Florida judicial elections).

Opposing candidates are free to criticize the record of a sitting judge, although they still may not comment on how they would rule in a future case. MODEL CODE OF JUDICIAL CONDUCT, Canon 5 (1990). Of course, interest groups can go farther than candidates in criticizing a judge's record.

128. *See United Latin American Citizens*, 914 F.2d at 295-96; Chisom v. Roemer, 111 S. Ct. 2354, 2367 (1991). It is no coincidence that the rise of an elective judiciary occurred during the era of Jacksonian democracy. By electing judges, Jacksonian reformers hoped to make judicial selection more democratic and the judiciary more representative of the general public. Edward A. Sheridan, Note, *The Equal Population Principle: Does It Apply to Elected Judges?*, 47 NOTRE DAME L. REV. 316, 317 (1971). The appointive judicial selection system in place during the pre-Jacksonian era was widely viewed as a "political spoils system" benefiting the rich and elite. DUBOIS, *supra* note 3, at 3. Before the emergence of judicial elections, judges were either elected by the state legislature or appointed by the governor and confirmed by the legislature or a special council. *Id.* A few states still rely exclusively on legislative or gubernatorial appointment to select judges. *See supra* note 84.

judicial philosophy.[129]

Despite the validity of this criticism, however, the judiciary remains less political and more constrained in its decision making than the legislative or executive branch.[130] At the very least, there is general agreement that the judiciary should be less political than the legislature.[131] Moreover, few judicial elections receive the publicity or attention that races for United States Senate or even city council receive.[132] Indeed, judicial elections are rarely contested,[133] and even when they are, few voters become familiar with the candidates.[134]

The second difference in decision making is that legislators make decisions collegially while trial court judges do so on an individual basis. Individual legislators are members of a larger legislative body; as such, they cannot make law by themselves.

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129. The defeat of California Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso in a 1986 retention election is a good example. *See* Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52-54. Bird, Grodin, and Reynoso were successfully targeted for defeat by interest groups who labeled the justices as "soft on crime." *Id.* at 52.

Several studies have shown that judges feel and respond to constituent pressures. *See* DUBOIS, *supra* note 3, at 31. In a *Los Angeles Times* poll taken after Bird's defeat, 53% of California state judges believed that "judges would now have to worry about the political consequences of their decisions." Ross, *supra* note 127, at 117.

130. Certain members of the critical legal studies movement would disagree with this assessment. Extending the Realist critique to its logical extreme (critics of critical legal studies might say illogical extreme), some members of the critical legal studies movement argue that there is *no* functional difference between judges and legislators. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 192-93 (1987); *see also* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 326-30 (1988) (providing overview of typical critical legal studies positions on lack of difference between judicial and legislative representation). *See generally* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 2d ed. 1990) (explaining implications of critical legal studies positions on various substantive legal issues).

131. *See* Chisom v. Roemer, 111 S. Ct. at 2369 ("[I]deally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment."); DUBOIS, *supra* note 3, at 24. This is one of the main arguments used by those who want to replace elective methods of judicial selection with appointive ones. *See id.*, at 22.

132. *See* DUBOIS, *supra* note 3, at 32-33. *But see* Andrew Blum, *1990 Vote: Two Issues Dominate*, NAT'L L.J., Nov. 5, 1990, at 1, 28-29 (describing how anti-abortion groups' opposition to sitting judge gave Florida judicial race national significance).

133. DUBOIS, *supra* note 3, at 33.

134. *Id.* at 36, 64 (arguing that voters in judicial elections are "indifferent" and "apathetic," and know little about candidates and issues involved in judicial elections). *But cf. id.* at 31 (arguing that elected judges must respond to voters or face electoral defeat).

Legislators can enforce their will only by acting collegially as part of a legislative body. Trial court judges, in contrast, decide cases by themselves, no matter how many trial judges there are in a particular district.[135] Unlike the individual decision of the legislator, the individual decision of a trial court judge is binding and enforceable unless reversed by a higher court. This distinction, however, does not apply to all courts. Unlike trial courts, appellate courts exercise power in a collegial fashion.[136]

Judges typically are elected at-large from districts with boundaries that are coterminous with their court's jurisdictional base.[137] Thus, subdistricting necessarily involves breaking the link between jurisdictional and electoral base:[138] after subdivision, a judge's electoral base is smaller than her or his jurisdictional base.[139]

Separating a legislator's "jurisdictional" base from her or his electoral base is not a problem because legislators make decisions collegially and not individually.[140] A single legislator elected from a subdistrict cannot unilaterally make law that binds her or his entire district.[141] Trial court judges, however, decide cases by themselves, and the decision of a trial court judge elected from a subdistrict may be binding unless reversed by a higher court. Because trial court judges do not exercise their power collegially, there is no immediate check on a judge's policy preferences that reflect the wishes of the judge's subdistrict but not the larger community.[142]

Even if judges do not decide cases by reference to subcommunity norms, subdistricting may undermine a court's legitimacy by creating the perception that judges are accountable to subcommunity policy preferences.[143] Along these lines, it is im-

135. Haydel, *supra* note 89, at 72 ("Even in those districts with two or more judges, district court judges do not act as a group. Each judge is responsible for a specific proportion of the caseload. There is no negotiation, discussion, compromise or give-and-take among judges when hearing cases. Each judge acts alone in applying the law to the case at hand."). *But see* League of United Latin American Citizens v. Clements, 914 F.2d 620, 647, 661 n.19 (5th Cir. 1990) (en banc) (stating that the administrative aspects of Texas trial court judges' duties are characterized by collegial decision making), *rev'd sub nom.* Houston Lawyers Ass'n v. Attorney Gen. of Texas, 111 S. Ct. 2376 (1991).

136. *See* DUBOIS, *supra* note 3, at 252.

137. *See United Latin American Citizens*, 914 F.2d at 646.

138. *See id.*

139. *Id.*

140. *See supra* notes 135-36, and accompanying text.

141. *See supra* notes 135-36, and accompanying text.

142. *See United Latin American Citizens*, 914 F.2d at 651.

143. *See id.* at 650-51.

portant to note that subdistricting is an explicitly race-conscious remedy; the creation of "safe" minority subdistricts necessarily involves the drawing of boundaries around minority neighborhoods.[144] Therefore, some critics argue, subdistricting may lead to the same sort of racial tension and perception of "favoritism" that accompanies other race-conscious remedies such as affirmative action.[145]

## IV. A REMEDIAL SCHEME FOR AT-LARGE JUDICIAL ELECTIONS THAT TAKES THE UNIQUE NATURE OF THE JUDICIARY INTO ACCOUNT

Two principles guide the creation of vote dilution remedies. First, the remedy must completely correct minority vote dilution.[146] Second, devising the remedy requires a careful and "intensely local approach."[147] Subdistricting can satisfy the first principle.[148] In the case of trial courts, however, it fails to satisfy the second principle.[149]

The distinction between appellate courts, which decide cases in a collegial fashion, and trial courts, in which a single judge makes a decision, is important. A remedy for vote dilution in a non-collegial trial court should retain the link between electoral and jurisdictional base. This entails the use of alternative remedies, such as limited voting or cumulative voting, that do not involve the subdistricting of judicial districts.[150]

144. *See* Karlan, *supra* note 61, at 236 (noting that "many thoughtful critics worry about permanently embedding racial polarization in the political landscape by drawing district lines in an expressly race-conscious manner"). In a sense, subdistricting is a form of residential segregation. *See* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 493-507 (1988) (arguing that subdistricting allows white voters to ignore their minority counterparts, thus perpetuating the effects of past discrimination).

145. *See* James S. McClain, Note, *The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution*, 67 TEX. L. REV. 139, 150-51 (1988) (arguing that race-conscious redistricting is a form of racial segregation that will result in "political segregation" and increased racial polarization); *cf.* Note, *Affirmative Action and Electoral Reform*, 90 YALE L.J. 1811, 1828 (1981) (arguing that subdistricting imposes "harsh and unequal burdens . . . on members of the majority [which] foster resentment of affirmative action").

146. *See supra* text accompanying note 61.

147. *See supra* note 63 and accompanying text.

148. *See supra* text accompanying notes 69-71.

149. *See supra* text accompanying notes 142-45 (discussing trial courts).

150. *See supra* notes 72-82 and accompanying text.

Limited and cumulative voting retain the link between jurisdictional and electoral district boundaries while curing the vote dilutive effects of straight at-large districting.[151] Using these mechanisms would reduce the risk of judges being beholden to voters in a specific subdistrict within a larger jurisdictional district. Alternative voting systems also avoid the appearance of favoritism created by the race-conscious nature of subdistricting.[152]

Moreover, a limited or cumulative voting system avoids the possibly negative effects of electoral segregation that result from subdistricting.[153] Alternative voting systems do not require that lines be redrawn, nor do they require interferences with a state's organization of its judiciary such as mandating the division of multi-member districts into single-member districts; therefore, they are less likely to exacerbate racial tensions.[154]

The alternative remedies raise three problems. First, both limited voting and cumulative voting are more complex, or at least less familiar to voters, than conventional voting systems. This is especially true of cumulative voting.[155] It is less true of limited voting; the concept behind limited voting is little different than that behind "single-shot voting."[156]

Second, some critics argue that limited and cumulative voting undermine the two-party system by giving smaller groups an opportunity to elect representatives.[157] As one commentator points out, however, this misses the point, because the very essence of a vote dilution claim is that conventional voting systems deny smaller groups the opportunity to elect representatives.[158] In addition, this is less of a problem with judicial elections, approximately half of which are nonpartisan.[159]

Third, critics of limited voting also argue that it denies voters the opportunity to make a selection for every elective position in their district.[160] Because the alternative to limited

151. *See supra* notes 72-82 and accompanying text.
152. *See supra* notes 144-45 and accompanying text.
153. *See* Abrams, *supra* note 144, at 493-507. With limited voting, minority voters are more difficult to ignore because a judge is never sure of her or his constituency.
154. *See supra* notes 144-45 and accompanying text.
155. *See Alternative Voting Systems*, *supra* note 72, at 155.
156. *See supra* text accompanying notes 46-48.
157. *See* Karlan, *supra* note 61, at 230.
158. Karlan, *supra* note 61, at 230-31.
159. *See* JUDICIAL SELECTION, *supra* note 3, at 6.
160. *Alternative Voting Systems*, *supra* note 72, at 148.

voting, subdistricting, even more severely restricts the number of candidates a voter may support, this objection is unfounded.[161]

The choice between limited and cumulative voting, like the choice between subdistricting and alternative remedies, should be guided by the two remedial principles mentioned above. Cumulative voting offers the better guarantee of minority representation.[162] Limited voting, however, is simpler and may be more widely accepted by the public.[163] In at least one instance, when the district elects a very small number of judges, cumulative voting is preferable to alternative voting. For example, if a district is electing only two judges, cumulative voting is actually simpler and will seem more "fair" than limited voting.

The arguments against subdistricting do not apply with the same force to appellate court elections. Although the policy-making role of appellate judges is evident and indisputable,[164] appellate courts decide cases in a collegial fashion.[165] Thus, appellate judges are less likely than trial judges to represent a particular subcommunity to the detriment of the larger com-

161. Karlan, *supra* note 61, at 226; *cf.* League of United Latin American Citizens v. Clements, 914 F.2d 620, 649 (5th Cir. 1990) (en banc) (stating that at-large districting, unlike subdistricting, "permits voters to vote for each and every judicial position within a given district"), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S. Ct. 2376 (1991).

162. *Alternative Voting Systems*, *supra* note 72, at 153-54 (stating that cumulative voting, unlike other voting, "allows interest groups to plan strategically to maximize their representation").

163. *See supra* notes 74-82 and accompanying text (discussing cumulative and limited voting).

164. *See* DUBOIS, *supra* note 3, at 251-52 ("[A]ppellate judges, especially those serving on state courts of last resort, are clearly policy-making officials."). *See generally* Henry R. Glick, *State Court Systems*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 682, 695-99 (Robert J. Janosik ed., 1987) (stating that courts make policy through decisions that have broad significance and consequences for society).

165. *See* DUBOIS, *supra* note 3, at 252 ("Not only do appellate courts engage in more frequent and explicit instances of policy-making than trial judges, but judges at the higher level 'are subject to fewer pressures for political favors, in fact have fewer favors to dispense, make *collegial* decisions so that one judge cannot control the outcome of a case, and tend to be insulated from politics by the "aura of power, dignity, and remoteness" of the appellate environment.'" (emphasis added, footnote omitted) (quoting Kathleen L. Barber, *Selection of Ohio Appellate Judges: A Case Study in Invisible Politics*, *in* POLITICAL BEHAVIOR AND PUBLIC ISSUES IN OHIO 175, 185 (John J. Gargan & James G. Coke eds., 1972) (quoting LEWIS MAYERS, THE AMERICAN LEGAL SYSTEM 395 (rev. ed. 1964)))). *But see* Haydel, *supra* note 89, at 72 ("Appellate judges sit in rotating groups of three; they do not act alone, but neither do they act as a collegial body in deciding cases.").

munity.[166] For these reasons, subdistricting is an acceptable remedy for vote dilution in elections for appellate judges. Whether it is the *best* remedy is another question. Subdistricting is more intrusive than the alternative voting systems discussed in this Note.[167] While the fact that appellate districts are larger than trial court districts may lessen the probability of racial tension that accompanies subdistricting,[168] legislators and courts still must carefully evaluate the costs and benefits of a subdistricting remedy before implementing it at the appellate level.[169]

An alternative to limited or cumulative voting is the elimination of judicial elections in favor of appointive or merit selection systems as a remedy for judicial violations of the Voting Rights Act.[170] While there are good reasons for abandoning judicial elections in favor of non-elective selection methods,[171] the elimination of electoral discrimination is not one of them.

Appointive methods are not as likely to lead to the same levels of minority representation as the other remedies discussed in this Note. There is conflicting evidence on whether appointive methods of judicial selection result in a greater level

166. One commentator notes that the first Congress had a geographic notion of representation in mind when it enacted the Judiciary Act of 1789. AMERICAN ENTERPRISE INSTITUTE, WHOM DO JUDGES REPRESENT? 4 (1981) (comments of Sheldon Goldman) ("[T]here was a sense [among members of the first Congress] that, although we were united states, regional differences existed within the country that deserved representation on the bench.").

167. *See supra* note 145 and accompanying text.

168. *See supra* note 145.

169. The general remedial approach suggested by this Note also can be applied to violations of the Voting Rights Act that do not involve at-large districting and cannot be cured by subdistricting or alternative voting remedies. Such violations fall into two areas. One area includes "traditional" violations such as the use of slating groups, run-off elections, and anti-single-shot devices. *See supra* notes 46-60 and accompanying text. A second area includes "new" violations involving the "impermissible concentration of power" in certain elected positions. *See supra* note 31.

Traditional violations involve no new considerations and usually can be remedied by eliminating the violative law or practice. Of course, courts or legislators must be careful to make remedial considerations in light of the differences between judges and legislators. *See supra* notes 114-45 and accompanying text. Consider, for instance, majority vote requirements. *See supra* note 53 (discussion of majority vote requirements). Majority vote requirements in part stem from the history of one-party control in the South and the desire to prevent the election of "extremist" candidates. *See* Simpson, *supra* note 53, at 389-90.

170. *See* Haydel, *supra* note 89, at 71-72.

171. *See* Ross, *supra* note 127, at 134 (explaining that judicial elections hamper protection of rights of criminal defendants).

of minority representation on the bench when compared with *current* electoral practices. According to recent studies, a change from an elective to an appointive selection method will not increase the level of minority representation.[172]

Additionally, the judicial selection committees that are part of most appointive selection system resemble exclusive slating groups, a recognized vote dilutive device.[173] Like slating groups, judicial selection committees tend to be predominantly composed of white males.[174] Thus, even if committees select minority candidates, they may not be the choices that would have been made by the minority community itself.[175] For these reasons, the change to an appointive system may not pass muster under Sections 2 or 5.[176]

## CONCLUSION

At least twenty-five states elect all or most of their judges. In most of these states, minority groups are not significantly represented on the bench. Because at-large districting and other discriminatory election laws are prevalent, minority voters will continue to face obstacles in electing judicial candidates.

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172. *See* Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315, 321 (1990) (arguing that blacks are equally underrepresented across selection jurisdictions; "[A]t minimum, [minority] groups would not benefit [from the switch to] merit selection . . . , and at maximum they would be worse off"); Nicholas O. Alozie, *Black Representation on State Judiciaries*, 69 SOC. SCI. Q. 979, 985 (1988) (arguing that percentage of black lawyers in a state, and not a particular selection process, is the best predictor of level of black representation on the bench); Philip L. DuBois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, 8 JUST. SYS. J. 59, 64 (1983) (noting only a slight difference in the level of minority representation between elective and appointive systems for selecting California trial court judges). *But see* American Judicature Society, *The Black Judge in America: A Statistical Profile*, 57 JUDICATURE 18, 18 (1973) (indicating that an "overwhelming majority of black judges attained their judgeships through some type of appointive process").

173. A slating group is a group that controls the nomination process. *See supra* note 58.

174. *See* Patrick W. Dunn, *Judicial Election and the Missouri Plan*, *in* COURTS, LAW AND JUDICIAL PROCESSES 105, 108-10 (S. Sidney Ulmer ed., 1981).

175. *See* Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1975) (stating that success of black candidates at polls does not foreclose possibility of dilution of black vote), *aff'd sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

176. *See Update*, *supra* note 83, at 76 (1989) (transcript of panel discussion) (comments of Hendricks) (questioning whether merit selection would pass muster under § 2).

This Note proposes that courts and legislatures use either limited voting or cumulative voting to remedy minority vote dilution in at-large elections for trial and other non-collegial courts. While subdistricting is an acceptable remedy for appellate courts that make decisions collegially, it is not clear, even at the appellate level, that subdistricting is preferable to other remedies.

The problems created by subdistricting judicial districts are likely to reappear in other forms when the Voting Rights Act is applied to other types of discriminatory election practices. When devising remedies for electoral discrimination in judicial elections, however, courts and legislatures should not uncritically apply a legislative model to the judiciary. Courts differ from legislatures in significant ways, and remedies must take account of these differences.